

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.
JAMES HANNUM,

Plaintiffs,

-vs-

08-CV-0811

YRC FREIGHT, INC.,
ROADWAY EXPRESS INC., and
YELLOW TRANSPORTATION, INC.,

Defendants.

Proceedings held before the
Honorable Michael J. Roemer, Robert H.
Jackson Courthouse, 2 Niagara Square,
Buffalo, New York, on August 12, 2019.

APPEARANCES:

KATHLEEN LYNCH,
Assistant United States Attorney,
BENJAMIN YOUNG,
U.S. Dept. of Justice Attorney,
Appearing for Plaintiffs.

STEPHEN L. HILL, ESQ.,
SEAN C. CENAWOOD, ESQ.,
Appearing for Defendants.

AUDIO RECORDER: Rosalie A. Zavarella

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(Proceedings recorded by electronic sound
recording, transcript produced by computer.)

1 THE CLERK: United States District Court
2 for the Western District of New York is now in
3 session. The Honorable Michael J. Roemer
4 presiding.

5 We're here on the matter of U.S.A. versus
6 Roadway Express, et al, case number 08-CV-811, for
7 motion hearing.

8 Counsel, please state your name for the record.

9 MS. LYNCH: Kathleen Lynch and Ben Young
10 on behalf of the United States.

11 MR. HILL: Stephen Hill and Sean Cenawood
12 on behalf of the defendants, your Honor.

13 THE COURT: Good afternoon, counsel.
14 We're here for oral argument on the defendants'
15 motions to dismiss and for change of venue. I have
16 read the papers. And also when you each start off,
17 if you could give me a little bit of factual
18 background, it might help me out a little bit to
19 understand kind of the whole procedure here as to
20 what happens.

21 MR. HILL: Your Honor, I haven't appeared
22 in front of you. May I make the argument from the
23 desk?

24 THE COURT: You can sit there, and all I
25 ask is you speak into the microphone. Pull the

1 microphone up. You can stand at the podium if
2 you're more comfortable. I draw the line at laying
3 down. Okay.

4 MR. HILL: I'll do my best on that last
5 one.

6 THE COURT: Okay.

7 MR. HILL: I'll go first, your Honor,
8 since these are our motions.

9 THE COURT: Okay.

10 MR. HILL: The background on this, your
11 Honor, is that the defendants are three shippers --
12 pardon me, carriers that provided shipping services
13 to the government. The basis or the way it would
14 practically work is that the government,
15 particularly the Department of Defense, would
16 indicate to the carriers that they had shipping to
17 be done.

18 THE COURT: They posted in some kind of
19 like central registry --

20 MR. HILL: Correct.

21 THE COURT: -- then a shipper would -- or
22 would they put in a bid for it or --

23 MR. HILL: No.

24 THE COURT: You had like open contracts
25 and then you choose which ones you want to take?

1 MR. HILL: That's right.

2 THE COURT: And then what if two shippers
3 put in for it at the same time? Was it like
4 first-come-first-serve type thing?

5 MR. HILL: I'm not sure that that -- I'm
6 not sure what would happen in that circumstance,
7 your Honor.

8 THE COURT: Okay.

9 MR. HILL: The DOD personnel would put
10 together a bill of lading that would include
11 weight. It would be --

12 THE COURT: So the carrier somehow
13 communicates to DOD we want that job?

14 MR. HILL: Right.

15 THE COURT: Maybe an email or some
16 response on whatever the registry is?

17 MR. HILL: Right.

18 THE COURT: And then the government would
19 do up a bill of lading?

20 MR. HILL: Correct.

21 THE COURT: Okay.

22 MR. HILL: The bill of lading is prepared.
23 They show up. They pick up the shipment. It is --

24 THE COURT: Presumably for some supplier
25 of whatever it is that the government's ordered?

1 MR. HILL: Yeah. The typical contract,
2 your Honor, was military personnel movings. So I
3 want to move from base A to base B.

4 THE COURT: Okay. So personnel moving
5 from base to base, that was primarily what was
6 involved?

7 MR. HILL: Right. There could be other
8 things that could be moved, but --

9 THE COURT: Been there, done that.

10 MR. HILL: Okay. Then it's picked up and
11 it goes to a central terminal where they put
12 together various loads. It may or may not be
13 reweighed at that time, depending on when the
14 shipment was. At some point there are --

15 THE COURT: So it would go to some
16 terminal, like there's one in Tonawanda I think
17 here, isn't there, or --

18 MR. HILL: Buffalo.

19 THE COURT: Yeah.

20 MR. HILL: And it would -- it may or may
21 not be reweighed. Then it gets -- it gets put on a
22 truck, gets delivered. Ultimately the information
23 regarding the shipment is put into an electronic
24 computer, an electronic platform that both the
25 shipper and the government share. The information

1 is provided to them.

2 THE COURT: So it would be the shipper
3 making the entry, you know, it's been delivered.

4 MR. HILL: Yeah.

5 THE COURT: X amount of pounds, whatever.

6 MR. HILL: Here's the bill of lading.

7 THE COURT: Okay.

8 MR. HILL: And then --

9 THE COURT: Now the weighing, okay, was
10 that -- was that discretionary? That was at the
11 shipper's discretion whether or not to reweigh the
12 load?

13 MR. HILL: It depends on the date and the
14 contract. At one point the -- the forklifts that
15 move the freight have scales on them, so they
16 automatically do it. Early in the process it's up
17 to -- it's the discretion of the shipper.
18 Typically they're going to weigh that to figure out
19 how much weight they've got on it, whether or not
20 they comply with DOT regulations.

21 THE COURT: Because a truck can only carry
22 so much weight.

23 MR. HILL: It could only carry so much.
24 They want to know the density for safety reasons.
25 Ping pong balls move differently than bowling balls

1 do. And then once it's -- the information is
2 entered on the -- the computer system, the billing
3 activity, whether it is the government saying I
4 don't agree with your bill, or movement at
5 administration towards payment is all done on that
6 electronic platform.

7 THE COURT: Okay. Let's go back to the
8 weighing again. So it's -- you don't have to
9 reweigh it as the shipper?

10 MR. HILL: That's correct. For purposes
11 of the services you're providing to the carrier you
12 do not. For purposes --

13 THE COURT: Services you're providing to
14 the government.

15 MR. HILL: Correct.

16 THE COURT: Okay. You're saying they
17 automatically weigh it when they put it on to make
18 sure they're in compliance with whatever the DOT
19 regulations are?

20 MR. HILL: That's the typical practice.

21 THE COURT: Okay. But they -- they could
22 either choose to go with what's on the original
23 bill of lading, go with that, or they can reweigh
24 it?

25 MR. HILL: Well, they're going to look at

1 the freight and make sure that they think that the
2 bill of lading is consistent with what they see.
3 They're going to eyeball that. They have trained
4 personnel to look at it and say that doesn't look
5 like a thousand pounds to me, let's reweigh it.
6 That's before the scales automatically weighed it
7 as a matter of course.

8 THE COURT: I kind of want to get this
9 down in my head, because it seems to be central to
10 the case about reweighing. Okay. So somebody
11 makes a decision that it should be reweighed, and
12 if it's heavier than what the bill of lading says,
13 you amend that and send it in to get more money for
14 the service.

15 MR. HILL: That's correct.

16 THE COURT: And if it's lower --

17 MR. HILL: The allegations are that we did
18 not change -- at a certain point in time we did not
19 change the weight.

20 THE COURT: When it was lower?

21 MR. HILL: When it was lower.

22 THE COURT: Only when it was higher?

23 MR. HILL: Correct.

24 THE COURT: Okay. You can go ahead.

25 MR. HILL: Okay. Your Honor, given the

1 fact that the Court has read the pleadings, I'm
2 just going to hit on a couple of points. In
3 particular I want to talk a little bit about the
4 materiality allegations that are required, as well
5 as touch briefly on the 9(b).

6 Your Honor, the government's materiality
7 allegations are primarily set forth in five
8 paragraphs, paragraphs 9, 104, 105, 107, and 109.
9 The -- for example, in paragraph 9 they say these
10 false claims and false statements were material as
11 they had a natural tendency to influence DOD's
12 decisions to pay the defendants. They repeat that
13 conclusionary language, which is basically just
14 parroting the definition provided in the statute
15 in -- in paragraph 104. In paragraph 105 --

16 THE COURT: Let me get the paragraph 104.

17 MR. HILL: In paragraph 104 -- as you're
18 looking for it, I'll read it, your Honor.

19 THE COURT: Sure.

20 MR. HILL: Under this definition the
21 defendants' false claims and false statements were
22 material as they had a natural tendency to
23 influence DOD's decisions to pay claims, award
24 contracts, accept tender, and not to try to recover
25 overpayments. In paragraph 105 they say -- they

1 allege that the allegations were capable of
2 influencing DOD's payment decisions. They repeated
3 that type of language in 107, but interchange the
4 party to say that it was capable of influencing
5 SDDC's decision to approve defendants. And then,
6 finally, they say in paragraph 109, the defendants'
7 false representations relating to specific
8 shipments were material to the defendants'
9 obligation to return overpayments to DOD.

10 Your Honor, we believe that these factual
11 allegations as set forth in the complaint don't
12 actually allege the requisite facts to establish
13 materiality. They are conclusory statements or
14 simply repeat the definition in the statute. They
15 don't go to the extent that the chief judge of this
16 district required in the Strock decision where he
17 talked about concrete examples that would
18 demonstrate that had the government known, it would
19 have denied these payments.

20 Further, your Honor, on materiality, we believe
21 the Court can take judicial notice of the statutes
22 and the regulations that govern this activity. The
23 reason that those were important is that they go to
24 the Supreme Court's reasoning and conclusions in
25 Escobar where they say that the government's

1 continued knowledge -- pardon me, continued payment
2 of claims with knowledge of the underlying activity
3 is strong evidence that it's not material.

4 In this instance, your Honor, the relator filed
5 the original qui tam complaint in November of 2008.
6 It's our position that under Escobar this Court
7 could look at -- rather than trying to opine or
8 infer what the government would do, can actually
9 look at what the government actually did here. And
10 that we think that this is important because, as
11 was again pointed out in Escobar and then again in
12 Strock, there's no allegation that the -- that the
13 government denied a claim, suspended any of the
14 shippers, even went so far as to write a warning
15 letter that would say we're aware of how you're
16 interpreting this. You're interpreting it
17 incorrectly. You need to discontinue. All those
18 remedies were available to the government.

19 THE COURT: What's your position as to
20 when the government should have reasonably known
21 that and took some kind of action?

22 MR. HILL: At or near the time the United
23 States Attorney's Office had access to the
24 allegations in the relator's complaint.

25 THE COURT: So this case was opened

1 in 2015, so -- I'm sorry, what is it? 2008. So
2 you're saying at least in 2008 they should have
3 known.

4 MR. HILL: Yes.

5 THE COURT: And anything they paid after
6 that is their own fault.

7 MR. HILL: Well, yes. But most
8 particularly it goes to the Escobar and Strock
9 decisions which say this is evidence that -- that
10 these were not material. With knowledge of this
11 they continued to do it. And the point -- the
12 reason we brought up --

13 THE COURT: Well, I guess -- okay, go
14 ahead. I almost view those as two different
15 things. In one instance you're somehow barred
16 because you waited, you sat on your right, you
17 didn't do anything, which I guess would be a
18 defense, right, to the charges. Or there's lack of
19 materiality.

20 I have trouble, to be honest with you, with the
21 lack of materiality. I mean, you know, it's a
22 significant place, for instance, between what would
23 have been charged had the true weight been reported
24 as opposed to what weight was reported and what was
25 used. I mean, I'm looking at in particular Exhibit

1 A, the very first entry has the actual weight of
2 the shipment was 140 pounds and the billed weight
3 was 6,000 pounds. That's a 98 percent change
4 difference between the actual weight and the real
5 weight. Isn't that on its face material, that, you
6 know, if they would have known that they were
7 getting billed 98 percent higher than what the
8 actual work was, that that would have made a
9 difference in what they did?

10 MR. HILL: Well, your Honor, to speak
11 specifically to what the Supreme Court said, they
12 said that knowledge and inaction by the court is
13 strong evidence, regardless of the amount --

14 THE COURT: By the government, I think,
15 right?

16 MR. HILL: Yes.

17 THE COURT: You said the court.

18 MR. HILL: Oh, pardon me.

19 THE COURT: I thought I did something
20 wrong.

21 MR. HILL: No, no. No. Regardless of the
22 amount, the Supreme Court didn't say well, if you
23 reach a certain threshold of how much is at issue,
24 that's material. What they said was we want and we
25 require the party that is seeking recovery under

1 the False Claims Act to plead evidence or plead
2 facts that would demonstrate that this would be
3 material and that the government would, in fact,
4 take action.

5 THE COURT: Yeah, but didn't -- wasn't --
6 in Escobar weren't they talking about failure to
7 comply with certain regulations that may or may not
8 have been relevant to whatever the determination of
9 pay the claim was? Say, for instance, there's a
10 regulation that says your trucks have to have a
11 first aid kit in them and they don't. Would that
12 be material to whether or not you get paid?
13 Probably not.

14 But this is -- if you're overcharging -- if the
15 actual contract that you entered into you're
16 overcharging the government, isn't that on its face
17 material? I'm having trouble with it. I'm
18 wrestling with it.

19 MR. HILL: No. Your Honor, there's no
20 precedence cited by the government that on its face
21 failure to pay -- or, pardon me, failure to live up
22 to the claim is material. And going back to your
23 question about Escobar, the Escobar language was
24 quite clear that this particular instance we're
25 dealing with today is relevant. They said in the

1 situation where the claim is based on either
2 statutory, regulatory, or contractual failure, then
3 it has to be material. And the United States'
4 claim here is the contract says you interpret your
5 obligation to weigh and charge according to this
6 specific language. So it's right on point with
7 Escobar.

8 I get the Court's point about the sort of issue
9 that might be involved. But the court was quite
10 clear that it was talking about this particular
11 circumstance, because it's a contractual dispute.
12 They interpret what we're obligated to do one way.
13 We interpreted it a different way.

14 THE COURT: But it goes to the heart of
15 the contract, right, the price that's being
16 charged. You're supposed to do a task and get paid
17 a certain amount of money. They're alleging you
18 didn't do the task, so you shouldn't get paid that
19 amount of money. Doesn't that go right to the
20 heart of it?

21 MR. HILL: Well, it is a central issue,
22 but the courts have said -- whether it's Escobar or
23 the Western District of New York have said you have
24 to allege facts and circumstances that would make
25 it clear the government would deny this claim. Our

1 argument is there are no such allegations in those
2 five paragraphs. They've not done that. They've
3 not alleged that.

4 Further, your Honor, we think that the Court,
5 this Court --

6 THE COURT: You think if the government
7 knew they were paying 98 percent more than what
8 they're supposed to pay, you think they would have
9 paid it anyways? It wouldn't have made a
10 difference to them?

11 MR. HILL: By their conduct, your Honor,
12 they could have said to the defendants the day
13 after they received that qui tam, look, here's your
14 warning letter. You're not allowed to do it this
15 way. They didn't do that, your Honor. They
16 further -- they could have suspended them, they
17 could have terminated, they could have picked up
18 the phone and said your contractual interpretation
19 is not the right way to do it. We're not going to
20 pay this. They could have done all those things.
21 They had knowledge as of November of 2008.

22 Materiality would require the government to say
23 this Court can look at specific allegations either
24 similar circumstances or other -- or specific
25 instances where we said to the defendants before

1 the Court today, don't do this. Courts have said
2 failure to do -- failure to exercise your remedies
3 and continue paying is evidence that it's not
4 material. And our point is the Court can either --

5 THE COURT: I guess I'm a little bit --
6 we're in a motion to dismiss phase.

7 MR. HILL: Right.

8 THE COURT: We're not in the summary
9 judgment phase or the trial phase. You're talking
10 about well, this is evidence of this or evidence of
11 that. All they have to do is allege it at this
12 point. There's no requirement that they produce
13 actual evidence of any of that.

14 MR. HILL: If I said that, your Honor,
15 that's not what I meant to say. What I meant to
16 say was in those five paragraphs they -- that I
17 went through with you, they have not alleged any
18 fact that could be taken as true today in a motion
19 to dismiss that gives the Court the basis to find
20 that these failures were material.

21 We also are arguing that the Court is allowed
22 in a motion to dismiss to take judicial notice. We
23 argue that it could take judicial notice of two
24 things. It could take judicial notice of the day
25 this case was filed and the government had

1 knowledge of the approach that was taken on these
2 contracts. We also argue that the Court could take
3 judicial knowledge of all of the means required of
4 the Department of Defense to communicate that it
5 didn't agree with the bill.

6 THE COURT: But they didn't know they
7 didn't agree because you weighed it, and only you
8 knew it was 98 percent lower than what it should
9 have been.

10 MR. HILL: Two things about that, your
11 Honor. The first is we've called the Court's
12 attention to the fact that by law, by regulation,
13 the GSA does an audit including the claim. At that
14 time they would have been able to say for all of --
15 because really what we're arguing about is not the
16 bills where the weight was increased. We're
17 arguing about the issue where the weight was
18 decreased. So it would be very easy for the
19 government as of November 2008, being aware of
20 these allegations, to have gone to GSA and said, in
21 your audits, did you find any instance where the
22 weight did not change? And they could have gone in
23 and looked at those and said --

24 THE COURT: That -- that -- that data
25 would have been there?

1 MR. HILL: Yes.

2 THE COURT: You guys kept track of which
3 ones were lowered that you charged full price for?
4 You had that in a database somewhere?

5 MR. HILL: At the time -- well, let me
6 back up. Exhibit A, which has been included, is
7 simply data that has been provided by the
8 defendants to the government. At the time -- that
9 data is not necessarily the claim. There are a lot
10 of other factors besides just the weight that goes
11 into --

12 THE COURT: Basically it's the weight and
13 the distance, right? Those are the two biggest
14 factors?

15 MR. HILL: The density, the immediacy of
16 how soon it will be delivered, where it will be
17 delivered, all those are factors. But, at the
18 time, all of that data would have been available to
19 both the defendants and the government.

20 THE COURT: So you're carriers, you kept
21 track of every time the weight was lower than what
22 it was alleged to be?

23 MR. HILL: Yes.

24 THE COURT: And you had that freely
25 available to the GSA when they did an audit?

1 MR. HILL: They could have gotten that
2 information.

3 THE COURT: Okay.

4 MR. HILL: And it's our position as to
5 materiality that they're -- by court precedent
6 they're obligated to do that.

7 Briefly, your Honor, two other points to cover
8 on the 9(b) portion of the -- of the motion. The
9 first has to do with the government's failure to
10 plead with specificity the actual claims. There
11 are at least two problems with those claims. The
12 first is the -- any party under a 9(b) review for
13 fraud is obligated to spell out the speaker, the
14 person, the entity making the claim, as well as the
15 claim itself. As the Court has pointed out, the
16 government in this case does not specifically say
17 which carrier was responsible for which shipment
18 that is on Exhibit A. The -- what they could have
19 done was to identify a particular carrier and a
20 particular claim. They don't do that. And by not
21 doing that, they have failed to meet the
22 requirement for specificity.

23 Now, the government's argument in its
24 pleadings, your Honor, is that this information was
25 readily available to only the defendants and not

1 the government. In fact, we would ask the Court to
2 take judicial notice again of the fact that they
3 had equal access per the GSA audit process. In
4 realtime they had access to that information.

5 They've cited the Chorches decision, your
6 Honor, from the Second Circuit which I think is
7 different for two reasons. First, the
8 whistleblower in that case had alleged in great
9 detail how the whistleblower was unable to get
10 access to the information. That's not the case we
11 have here. Second, in --

12 THE COURT: You mean that they haven't
13 alleged it?

14 MR. HILL: Yes. And in Chorches the
15 Second Circuit looking at that said we're going to
16 allow you to have a relaxed 9(b) standard here,
17 because you have alleged that you are not -- that
18 you can't get to the information. That's not the
19 case here. And, your Honor, the case was filed
20 in 2008, and then the government had a ten-year
21 investigation. At any time they could have gone to
22 their own databases, they could have asked for the
23 information. They had equal access through the GSA
24 process. This is not the Chorches situation where
25 they have alleged and so the Court has to agree

1 with the facts that are the basis for a limited or
2 relaxed standard.

3 Also, your Honor, under 9(b) we appreciate and
4 understand that the parties' obligation to plead
5 the scienter or the knowing requirement is a
6 general one. But as we pointed out in our
7 pleadings, there is no allegation in the complaint
8 that, first of all, says that the defendants knew
9 when they were submitting the bills that they were
10 false. There's no such allegation. There are
11 conclusionary statements, your Honor, where they
12 use the phrase knowing, saying defendants knowingly
13 submitted. But there is no factual basis to say
14 that this defendant knew it was false.

15 Second, we get into the reckless indifference
16 standard as a substitute for the actual knowledge
17 of the falsity. We cite for the Court's attention
18 the Safeco decision that talks about reckless
19 indifference and how it's not reckless indifference
20 when there is a reasonable interpretation or an
21 objective interpretation of contract.

22 Finally, on the scienter, your Honor, they are
23 pleading --

24 THE COURT: Is that a -- is that a
25 pleading deficit?

1 MR. HILL: Yes.

2 THE COURT: You had -- they say well, you
3 should have told us it was less than that. And you
4 say well, that's not the way we read the
5 regulation. That's -- that's a pleading issue or
6 that's a defense issue, a proof issue, later on
7 down the line?

8 MR. HILL: So, it's a good question, your
9 Honor. The standard at 9(b) is that you at least
10 plead some facts that the Court can draw an
11 inference of fraud. Our argument is that they have
12 not individually -- they've said as a group
13 defendants know -- knew that they were submitting
14 improper claims. Our argument is you have to go
15 beyond that at the pleading stage and specifically
16 argue facts related to each defendant that would
17 allow you to draw an inference of fraud in looking
18 for purposes of deciding whether or not they met
19 their pleading requirement.

20 Our argument is that, first of all, they've not
21 made any individual allegations. Second, our
22 argument is they've not provided any facts to the
23 Court from which it could draw an inference of
24 fraud. There's no allegations of expressed
25 knowledge, and we would argue there's no

1 allegations of facts that would let the Court infer
2 reckless indifference.

3 THE COURT: Isn't the bottom line to all
4 this that they have to make allegations that are
5 clear as to what you're being accused of? I mean,
6 sometimes we get cases in here they're very
7 complicated cases, they're Ponzi schemes, there are
8 all kinds of different things that they do. This
9 is pretty straightforward. I mean, you know, they
10 hired you to haul X amount of weight, you weighed
11 it, it was less than that, but you charged them for
12 X amount rather than the lower weight. I mean,
13 it's not a hard thing to understand or to figure
14 out. It's not complicated. Am I missing
15 something?

16 MR. HILL: No, your Honor, we would agree
17 with that. But the distinction, the sort of --
18 where you go just a little bit further is I think,
19 with due respect, your Honor, you described an
20 analysis that would be done on a breach of
21 contract. The additional pleading requirements
22 when you get into fraud include you have to allege
23 who submitted the fraud. They haven't done that
24 here.

25 THE COURT: Let's stop there for -- okay.

1 You said Exhibit A. Like they don't list who the
2 carrier was. Is there a possibility that Exhibit A
3 has carriers that aren't Roadway or Yellow?

4 MR. HILL: I don't know. I didn't prepare
5 the exhibit. But what I do know is they didn't say
6 what carrier was responsible for that particular
7 shipment.

8 THE COURT: I guess two things. Does it
9 matter at this point, because now you're combined.
10 You're on the hook for either one. And two, can
11 they fix that? If you needed that, could they go
12 back and just list each carrier for each -- I guess
13 they deliver them by delivery date they got them
14 listed.

15 MR. HILL: Well, if the Court were to
16 allow to amend, I think that that's an obligation
17 they'd have to meet.

18 THE COURT: Okay.

19 MR. HILL: But the other thing, your
20 Honor, is they've not -- Exhibit A is not the
21 claims. They're the weight difference, but they're
22 not the claims. And the I believe --

23 THE COURT: It says Exhibit A, examples of
24 defendants' false claims. I mean, that's what
25 they're asserting are the false claims.

1 MR. HILL: But they're not -- for example,
2 where is the bill of lading number for -- you
3 picked the first one, your Honor. Where is the
4 information related to claim was submitted on this
5 day, the bill of lading was number was X, the party
6 shipping this was X. They don't provide any of
7 that. And I think they're required to articulate
8 with particularity those --

9 THE COURT: For each claim?

10 MR. HILL: For each claim.

11 THE COURT: Okay.

12 MR. HILL: And to finish, your Honor,
13 the -- on the knowing requirement, the allegations
14 in the complaint are that there were a couple of
15 instances where individuals within the organization
16 were concerned about the business ramifications of
17 the reweigh policy. Your Honor, take those facts
18 as true, that's fine. But those allegations don't
19 create an inference for this Court that the
20 individuals who knew that knew that that specific
21 contract and how they were executing and
22 administering that they were fraudulently doing
23 that. That's not the same thing, and they had an
24 opportunity to depose people and ask them did you
25 think that this was wrong. There's no such

1 allegations in the complaint.

2 And we believe that the controlling precedent
3 would require them to plead not that there was
4 concerns among various individuals that their
5 clients might not -- or customers might not like
6 this interpretation. We believe they have to plead
7 that either the individuals knew and why they knew
8 that this was false or fraudulent. And simply
9 citing that there may be business consequences is
10 not enough to allege even generally the sufficient
11 knowing nature of the claims.

12 And on that point, your Honor, we did cite a
13 Southern District decision, the Colucci decision,
14 that said taking advantage of a contractual
15 interpretation is not enough for a false claim,
16 that it has to be something more than that. And we
17 believe that the Court is right, there is a
18 difference of opinion how to interpret the
19 obligation for the negative reweighs. But simply
20 taking advantage -- it's alleged that they're
21 taking advantage of their interpretation under the
22 Colucci decision was not enough.

23 THE COURT: That was on a motion to
24 dismiss?

25 MR. HILL: Yes.

1 THE COURT: Mr. Young?

2 MR. YOUNG: Good afternoon, your Honor.

3 THE COURT: By the way, we're going to --
4 we'll do the change of venue after we do this.

5 MR. HILL: Okay.

6 MR. YOUNG: Your Honor, the defendants'
7 motion should fail because --

8 THE COURT: Could you just do me a favor
9 and pull the microphone a little bit closer? We
10 don't have the luxury of a court reporter. This is
11 the low-rent district down here, so we record
12 everything, so you got to speak into the --

13 MR. YOUNG: This all seems very high rent
14 to me, your Honor. Is this okay?

15 THE COURT: Yep.

16 MR. YOUNG: Your Honor, the defendants'
17 motion should fail because, as I think the Court
18 seems to recognize, the United States has alleged a
19 textbook case of fraud. And it's amply supported
20 by detailed facts throughout the complaint as well
21 as the overwhelming weight of the case law.

22 The United States has alleged in some detail
23 the genesis and implementation of the defendants'
24 scheme to charge their customers, including the
25 Department of Defense, for inflated weights. The

1 scheme is that simple. It does not require a
2 lengthy analysis of various Department of Defense
3 rules. It is did you bill the correct weight on
4 the invoice? And they did not. They billed for a
5 higher weight than they knew to be true. The
6 United States has also alleged that the
7 defendants --

8 THE COURT: Well, what gets me hung up a
9 lot in this case is the fact that their reweigh was
10 discretionary. They didn't have to reweigh it.
11 They could have rolled the dice and in some cases
12 they would have made out and in some cases they
13 would have lost. But I -- I mean, there is no --
14 there was no -- apparently no regulation, no
15 contractual obligation to reweigh.

16 MR. YOUNG: That's correct, your Honor.

17 THE COURT: So you're saying well, they
18 did, and since they did and they knew some of them
19 were lower, then they should have told us.
20 That's -- that might be the moral and correct thing
21 to do. But what was the requirement that they do
22 that?

23 MR. YOUNG: Well, your Honor, the
24 defendants were required under the prevailing
25 Department of Defense transportation rules which --

1 THE COURT: Okay. Which rule you got
2 there that says that?

3 MR. YOUNG: So the MFTRP is the governing
4 rules for these transportations.

5 THE COURT: Right.

6 MR. YOUNG: And as the parties have
7 discussed in the various briefs, the MFTRP changed
8 over time.

9 THE COURT: It was amended, what, in 2009?

10 MR. YOUNG: It was amended in 2009, that's
11 correct, your Honor.

12 THE COURT: To try to get rid of whatever
13 ambiguity there was as to whether or not they
14 should be reweighed and whether or not you can
15 charge for a higher, not a lower, right?

16 MR. YOUNG: Right, your Honor. So in --

17 THE COURT: Is that right? Is that what
18 happened in 2009?

19 MR. YOUNG: It was amended in that way
20 in 2013.

21 THE COURT: But there was an attempt
22 in 2009 to do it, right? Or am I wrong?

23 MR. YOUNG: No, your Honor. In 2009 the
24 MFTRP was changed. So I'm -- prior to 2009 the
25 MFTRP had a shortened claim requirement which was

1 that if a carrier independently decided to reweigh
2 a shipment, and there was a discrepancy, you know,
3 if they found a discrepancy to the weight listed in
4 the bill of lading, they had to inform the
5 government. That requirement --

6 THE COURT: Did it say higher or lower?

7 MR. YOUNG: It did not say higher or
8 lower. It said when the carrier discovers a
9 discrepancy. It did not specify higher or lower.
10 Then in 2009 the MFTRP was amended, and that rule
11 was --

12 THE COURT: Oh, that's what it said before
13 the 2009?

14 MR. YOUNG: That's what it said before
15 2009.

16 THE COURT: All right.

17 MR. YOUNG: So when the defendants began
18 their, as we've alleged, fraudulent reweigh
19 practices, that was the rule. The defendants
20 have -- in their briefings have claimed that
21 the 2009 amendment somehow created some ambiguity,
22 that that would allow for the Court to find that
23 they reasonably thought that what they were doing
24 was okay within the rule. But even that 2009
25 amendment still has the same requirement, where, if

1 the defendants independently decide to reweigh a
2 shipment and discover a discrepancy, they are
3 obligated to report that to the government.

4 Now, the 2009 rule did have some additional
5 notification requirements. It flushed out the
6 notification requirements a little bit more, and it
7 also had a line saying that if the defendants
8 wanted to get paid for extra weight, then they had
9 to meet those requirements. But there's -- the
10 rule is still clear, if there's a discrepancy --

11 THE COURT: Did it say anything that if
12 it's lower you have to reduce your bill whatever it
13 was lower?

14 MR. YOUNG: It did not speak to that, your
15 Honor.

16 THE COURT: Okay.

17 MR. YOUNG: But the rule is still clear
18 that if there's a discrepancy, you have to notify
19 the government. And there's nothing in the rule to
20 suggest that the government was okay with being
21 overcharged. In fact, the interpretation the
22 defendants are now claiming that they had at the
23 time is -- to the extent that there's any ambiguity
24 in the rule, it's just not reasonable.

25 The notion that the government would have all

1 of a sudden -- in 2009 the Department of Defense
2 would say it's okay, you can overcharge us. We
3 only want to know when we can pay you more money.
4 It makes no sense. And the defendants haven't --
5 there's nothing in the four corners of the
6 complaint --

7 THE COURT: You say that, but what you
8 just told me was okay, if they independently
9 reweigh it, they have to report to you any
10 discrepancy. And then it went on to say if -- if
11 the weight was higher, to go ahead and make a
12 request. But it didn't say if it was lower, go
13 back and reduce your charge.

14 MR. YOUNG: Well, your Honor, it stated
15 that if -- in order to get paid for extra weight,
16 the defendants had to meet all the various
17 requirements. It would not have made -- the
18 corresponding language would not have made really
19 much sense. The government would not say in order
20 for us to pay you extra weight, you have to check
21 all these boxes. That's just as a matter --

22 THE COURT: That's what it said. That's
23 what you told me it said.

24 MR. YOUNG: Well, that's what it said for
25 the -- for the positive -- for the discrepancies in

1 the defendants' favor, the government said you have
2 to --

3 THE COURT: Here's what you got to do.

4 MR. YOUNG: Here's what you have to do.

5 THE COURT: But it was silent as to --

6 MR. YOUNG: But it was silent as to
7 what -- that's correct, your Honor. So it would
8 not have -- you know, again --

9 THE COURT: You don't even say it might be
10 reasonable and all that. It didn't say it.

11 MR. YOUNG: That's true, your Honor. But
12 we are at the motion to dismiss stage. All
13 inferences are to be taken in the government's
14 favor. And in order for the defendants to make
15 the -- and this speaks to their scienter argument.
16 In order for them to make that argument
17 successfully -- first of all, they're relying on
18 Safeco which has never been applied in the False
19 Claims Act context in this circuit. I don't think
20 they've applied -- I don't think they've applied to
21 any cases from the Second Circuit Court of Appeals
22 that have -- really speak to the argument they're
23 making.

24 But even if it did apply, even if Safeco did
25 apply and in 2016 the Supreme Court actually in the

1 Halo Electronics decision indicated that they
2 pulled back a bit from Safeco and they said that
3 culpability should be measured against knowledge at
4 the time of the challenged conduct. So it's this
5 idea that you can't after the fact come up with a
6 plausible interpretation and then not be culpable.

7 But assuming Safeco applies, there are
8 essentially three requirements. The language has
9 to be ambiguous. We've alleged that it was not,
10 that it was clear. The defendants' interpretation
11 has to be reasonable. As we've explained in our
12 briefings -- there's nothing in the complaint to
13 indicate that the defendants' interpretation --
14 first, that they actually had this interpretation
15 at the time. To the contrary, we allege in the
16 complaint that in 2010 the defendants understood
17 that MFTRP required the government to pay for the
18 correct weight. But there's nothing to suggest
19 that the defendants' interpretation was reasonable.
20 And then lastly, the issue is whether the
21 defendants were warned away somehow from the
22 interpretation.

23 THE COURT: Were what away?

24 MR. YOUNG: I'm sorry, warned away.

25 THE COURT: Warn, W-A-R-N-E-D?

1 MR. YOUNG: Yes, your Honor.

2 THE COURT: Okay.

3 MR. YOUNG: So there was some sort of
4 information outside the rule that would have given
5 the parties some notice that their interpretation
6 was incorrect. There's --

7 THE COURT: Just out of curiosity, did the
8 change in the regulation come up with this qui tam
9 action?

10 MR. YOUNG: Your Honor --

11 THE COURT: You don't know?

12 MR. YOUNG: I don't know, your Honor.

13 THE COURT: Go ahead.

14 MR. YOUNG: But there's nothing in the
15 record that really speaks to whether the defendants
16 were warned away or not. So, at this stage to
17 dismiss --

18 THE COURT: Okay. What happened in 2013?

19 MR. YOUNG: In 2013 the Department of
20 Defense further amended the rule to state that
21 whether the discrepancy was higher or lower,
22 carriers still had to notify the government when
23 they independently reweighed a shipment and found
24 it to --

25 THE COURT: Say that one more time, I'm

1 sorry.

2 MR. YOUNG: In 2013 the Department of
3 Defense -- the rule was amended so that whether --
4 to specifically state whether the weight
5 discrepancy was higher or lower, carriers still had
6 to provide notice to the government.

7 THE COURT: So at that point they provided
8 clarification, you had to report a discrepancy
9 higher or lower.

10 MR. YOUNG: That's correct, your Honor.

11 THE COURT: Okay. Did it say anything to
12 the effect that you had to amend your bill
13 accordingly or anything like that?

14 MR. YOUNG: Yes. I mean, the -- the gist
15 of the rule was that this was to correct the
16 billing so that the government was only paying for
17 the actual weight.

18 But again, to get back to the point, the
19 defendants really should only be able to prevail on
20 the knowledge side here after there has been
21 some -- you know, assuming that Safeco applies,
22 which we would say it does not, assuming that the
23 rule was ambiguous, which we would say it is not,
24 assuming their interpretation was reasonable, which
25 we would say it was not, the defendant would still

1 have to essentially -- there would have to be some
2 evidence in the record that they were not warned
3 away somehow from the interpretation they claimed
4 to have had. And we're just not there yet, your
5 Honor. And also --

6 THE COURT: Well, you say there would have
7 to be evidence in the record that they weren't
8 warned away. I guess, one, we're on their motion
9 to dismiss your complaint. That seems to be on
10 their end. And two, it's like proving a negative I
11 guess.

12 MR. YOUNG: That's correct, your Honor.

13 THE COURT: To show you weren't warned
14 away from something.

15 MR. YOUNG: That's -- that's fair. But my
16 point, your Honor, is that there has been no --
17 whether they were warned away or not is uncertain
18 at this point. There's been no discovery on that
19 issue. It's -- the record is just not developed,
20 so it would not be appropriate -- it would not be
21 appropriate to, you know, dismiss this case on that
22 basis.

23 THE COURT: I guess one of the biggest
24 questions I want to ask you is where were you?
25 What was going on? How come it took ten years to

1 get this together and to decide to intervene in the
2 case?

3 MR. YOUNG: It's a good question, your
4 Honor. So, just to give you a history of the case,
5 and I'll spare the Court my biographic details in
6 what I was doing at the time, because I was not
7 practicing law when the case was filed.

8 The qui tam was filed in November of 2008. It
9 was filed generally. It was not just filed with
10 respect to the Department of Defense. It was filed
11 government-wide. So this was not -- this was a
12 substantial undertaking for the government to take,
13 you know, all the different government agencies
14 that ship freight or contract to ship freight. It
15 was -- it was not as clear-cut as we now.

16 THE COURT: The initial qui tam action --
17 I don't know yet if it's relator or relator. I've
18 heard it pronounced both ways.

19 MR. YOUNG: Relator, your Honor.

20 THE COURT: Okay. Whether or not -- that
21 wasn't specific to DOD shipments, that was just in
22 general, I wanted the government to know this is
23 what they're doing on government contracts, no
24 matter who the source was.

25 MR. YOUNG: That's correct. The

1 allegation was when the United States uses the
2 defendants -- when any agency of the United States
3 uses the defendants as a freight carrier, this
4 fraud is happening.

5 THE COURT: But this case is only about
6 the DOD.

7 MR. YOUNG: That's correct, your Honor.

8 THE COURT: Okay.

9 MR. YOUNG: There was some investigation.
10 There was some back and forth with the defendants.
11 Based on correspondence from the defendants, the
12 parties were discussing settlement as early as
13 September 2010. And then in -- it was only in
14 November 2012 that the defendants provided the
15 negative reweigh information to the government. So
16 the government only -- at the earliest the
17 government could have arguably known the scope of
18 the defendants' false claims as well as the, you
19 know, what sort of discrepancies are we talking
20 about? Are we talking about was it 5 pounds
21 overweight or was it thousands of pound overweight?
22 The earliest the government knew that was November
23 of 2012.

24 And in November 2012 was when the Department of
25 Defense began the process to amend the rule in

1 question. So one of the things the defendants
2 have --

3 THE COURT: November 2012 did you send
4 them a letter or anything saying hey, knock it off.
5 You're not doing it correctly or --

6 MR. YOUNG: The record's not clear as to
7 what administrative action the Department of
8 Defense took with respect to the defendants. But
9 we'll say it's important to remember in -- the
10 defendants are making this argument in the context
11 of materiality. And in doing so, they've really
12 not stated correctly what the rule is for
13 materiality.

14 In Escobar the Supreme Court clearly outlined
15 two different ways materiality could be satisfied.
16 The first way is would a reasonable person consider
17 this conduct to be important. And here a
18 reasonable person would consider being overcharged
19 important. A reasonable person would consider
20 doing business with a company that habitually
21 cheats its customers as important. There's really
22 no need to get into, you know, what the government
23 would have done had it known. That question is
24 just not -- there's no need to reach that question,
25 your Honor.

1 But the Supreme Court did also make clear that
2 to the extent the government's actual conduct is at
3 issue, it -- it -- that conduct has to hinge on
4 when the government has actual knowledge. And the
5 defendants' position that the government had actual
6 knowledge when it received allegations in a qui tam
7 is just not correct. The government doesn't
8 actually know something has happened when it
9 receives qui tam allegations. It has allegations
10 that something has happened. It has an obligation
11 to investigate them and try to get to the bottom of
12 it. You know, if -- if the Department of
13 Defense --

14 THE COURT: Okay. I get that from 2008 to
15 November 2012. And then what about after
16 November 2012?

17 MR. YOUNG: After November 2012 the
18 parties -- the United States continued to
19 investigate. The United States received I believe
20 40,000 pages of documents in November of 2013.
21 Obviously there are -- you know, for the False
22 Claims Act purposes just knowing false claims have
23 been submitted is not the end of the government's
24 investigation. We also check to see whether we
25 believe we can satisfy scienter and materiality.

1 And then the parties were in settlement discussions
2 from 2015 to 2018. Those settlement discussions
3 broke down, and the United States moved to
4 intervene accordingly.

5 We're also -- if I can speak quickly about the
6 defendants -- the defendants have stated that --
7 also that there were audits that the government
8 could have taken that would have essentially
9 informed the government of what was going on. And
10 all of the different measures the defendants cite
11 to in their filings, none of them would have --
12 none of them call for the government actually
13 reweighing shipments or conducting its own weight
14 check, which is really what would have had to
15 happen here. As a practical matter, when the
16 government receives a shipment, you know, when the
17 defendants --

18 THE COURT: Well, there would be no way to
19 reweigh the shipment. The shipment is gone.

20 MR. YOUNG: That's correct. It's been
21 unloaded, and so --

22 THE COURT: Where -- in Exhibit A where do
23 the actual weights come from?

24 MR. YOUNG: The actual weights in Exhibit
25 A -- the defendants in 2012 they provided the

1 government with essentially a large spreadsheet of
2 information. They told us that they did not
3 capture -- contrary to what Mr. Hill said today,
4 that they did not capture the negative reweigh
5 information prior to 2010. So the contention that
6 the government could have just asked them for this
7 information is contrary to what we've been told by
8 the defendants.

9 Our understanding is they only -- and as we've
10 pled is that they only captured and retained the
11 positive information. And, in fact, as we pled,
12 the defendants actually took steps to hide these
13 negative reweighs in their own records. But
14 notwithstanding that --

15 THE COURT: Do you allege that in the
16 complaint?

17 MR. YOUNG: Yes, we did, your Honor. We
18 alleged it in -- it is in -- one instance of it is
19 in -- excuse me, your Honor. I'm sorry, your
20 Honor. We alleged it in paragraphs -- essentially
21 between paragraphs 83 and 89. For example, in
22 paragraph 86 we allege that in -- according to an
23 internal email from June 2009 YRC programmed its
24 computer system so that negative reweigh results
25 would never show up in the mainframe to be

1 recorded.

2 And again, it was not just the negative reweigh
3 results were not retained. It was that -- rather
4 than, you know --

5 THE COURT: This would seem to indicate
6 that they were purposely not retained, correct?
7 That's what you're alleging.

8 MR. YOUNG: We're alleging that the
9 defendants -- we're not alleging the defendants
10 purposefully destroyed the records. We are
11 alleging that the defendants intentionally took
12 actions to hide --

13 THE COURT: It doesn't say they destroyed
14 them. It said they just didn't record them.

15 MR. YOUNG: Well, that's right. In
16 paragraph 84 we say that the defendants did not
17 keep records of the negative reweigh corrections.

18 THE COURT: Right.

19 MR. YOUNG: And again, that matches their
20 representations to us, which is that essentially
21 they did not have this information to share with
22 the government at the outset of the investigation.

23 THE COURT: But they did after 2010.

24 MR. YOUNG: In 2000 -- in November 2012
25 they -- at that point they did share that

1 information with respect to the Department of
2 Defense.

3 THE COURT: Well, Exhibit A has 2010
4 information of actual weights.

5 MR. YOUNG: Correct. Correct, your Honor.
6 They went back to 2010. So in 2012 -- I'm sorry,
7 in 2012 they didn't share it prospectively. They
8 didn't say this is what we're doing from now on.
9 In 2012 they said essentially this is what we've
10 been doing for the last 20 months. And so it was a
11 spreadsheet of shipments that had already been
12 delivered.

13 THE COURT: I'm sorry, I'm a little
14 confused, because you said they didn't keep those
15 records. But then they were able to go back
16 to 2010 and tell you what the actual weights were.
17 So somewhere somebody had the information.

18 MR. YOUNG: Right. Correct, your Honor.
19 So prior to 2010 the defendants did not keep the
20 records. In 2010 they started to keep the records.
21 In 2012 they shared some of that information with
22 the government. That's -- that is the timeline.
23 And that information that they shared went back to
24 I think June 2010.

25 THE COURT: Okay. This information that

1 you have in Exhibit A, is that all the information
2 there is? I mean, did you use all the information?

3 MR. YOUNG: We -- that's -- those are the
4 main points, your Honor. The defendant did provide
5 us with --

6 THE COURT: Something that happened
7 in 2007, could you prove it right now?

8 MR. YOUNG: We could prove that the
9 defendants -- your Honor, we could prove that the
10 defendants were doing the exact same -- had the
11 exact same fraudulent reweigh practices. Whether
12 we could go back --

13 THE COURT: But you couldn't get in any
14 specificity, what -- what date, where it happened,
15 what the weight was, what the actual weight was,
16 what the weight charged, you don't have that
17 information?

18 MR. YOUNG: We don't have that -- no, your
19 Honor, we don't have that information today because
20 the defendant's destroyed it. We cannot --

21 THE COURT: Well, let's be careful. You
22 say they destroyed it. Did they destroy it or did
23 they not record it? I view those as two different
24 things.

25 MR. YOUNG: Fair enough, your Honor. The

1 defendants at a minimum did not record it. I can't
2 speak as to whether it was affirmatively destroyed
3 or not.

4 THE COURT: Okay. Say motion to dismiss
5 denied, we go through the case, you get to trial.
6 How are you going to prove anything that happened
7 before 2010 with regard to damages?

8 MR. YOUNG: Well, your Honor, one
9 option -- and we have not decided yet as to, you
10 know, what tact we would take at that juncture, but
11 one option would be to say essentially, as we've
12 alleged, the defendants provided us with 13,000
13 false claims in the 2010 to 2012 period. And one
14 thing we could do would be to take that information
15 and essentially, for damages purposes, extrapolate
16 it out and say, you know, there were X number of
17 false claims we submitted per month. These false
18 claims, you know, on average each one cost the
19 government Y dollars. Taking that information and
20 applying it --

21 THE COURT: If you added up all the
22 monetary, what's the damages in Exhibit A?

23 MR. YOUNG: Your Honor --

24 THE COURT: What does that add up to? How
25 much money are we talking about?

1 MR. YOUNG: We can't speak today as to how
2 much money we're talking about with respect to
3 Exhibit A. One of the reasons is the defendants,
4 when they provided us this information, they didn't
5 provide, for instance, the commercial -- the bill
6 of lading numbers. So it's not so simple for the
7 government to take this information --

8 THE COURT: So you don't know where the
9 shipment is going or anything like that?

10 MR. YOUNG: We know where the shipment was
11 going. We have the -- the shipper and the
12 recipient. We have more information. We have
13 enough information to think that -- that we could
14 at a minimum with some additional discovery from
15 the defendants be able to assign a damage value for
16 the false claims that the defendants have provided
17 for us.

18 THE COURT: Let me go back to what I was
19 first hearing about the way things work. Did you
20 agree with the defendants' description of how this
21 all worked about carrier putting in -- it was
22 posted on a central registry carrier?

23 MR. YOUNG: Yes, your Honor. The
24 defendants I think generally characterized this
25 correctly. And I wouldn't say they really got

1 anything too wrong. I would just say with respect
2 to these tenders, the way it worked was they
3 applied to DOD to basically say we want to be able
4 to put our tender in the catalog. So that various
5 DOD transportation officers could then essentially
6 say we want to ship some freight, open the catalog,
7 or access the catalog and see which carrier they
8 wanted to use. So I think -- I think that point
9 may have gotten lost in the shuffle a little bit.

10 THE COURT: So say this shipping household
11 goods for service members, that's what we're
12 talking about here, right, most of these or all of
13 them?

14 MR. YOUNG: It's not just household goods.
15 I think it --

16 MR. HILL: (Indiscernible).

17 MR. YOUNG: It's all manner of freight.
18 It's weaponry. It's equipment. It's supplies. I
19 mean, there are shipments to Department of Defense
20 installations and bases throughout the United
21 States that do all manner of things. And as we
22 included in Exhibit A, it's, you know,
23 various branches of the Department of Defense.

24 THE COURT: But it could be hauling a
25 bunch of different things. I must have

1 misunderstood. I thought it was only household
2 goods when we started the conversation.

3 MR. YOUNG: No, your Honor. It was all
4 manner of -- of --

5 THE COURT: Okay. So they put in --
6 excuse me. They put in an actual -- I'm going to
7 use the word bid or I think you use the word tender
8 for it?

9 MR. YOUNG: That's correct. Your Honor,
10 they submitted an application to essentially be
11 considered. And the -- the Department of Defense
12 command, the SDDC command, was basically the
13 gatekeeper for those applications. So, in order to
14 be --

15 THE COURT: In order -- what I'm trying to
16 get at is, you know, especially in private practice
17 I dealt often with we need somebody to do this, and
18 the other side would say yeah, and they'd submit
19 their thing, and had a whole set of terms on the
20 back of the form. The other side, okay, we accept.
21 They have a whole set of the different terms on the
22 back of the form. That's what I'm trying to find
23 out here, is there anything like that in this case?

24 MR. YOUNG: Excuse me, your Honor. As we
25 alleged, in the application as a standard

1 essentially condition of acceptance, the defendants
2 had to and all carriers had to say that they would
3 follow the MFTRP, the Department of Defense rules
4 governing these transactions and these shipments.
5 So that was -- that was a necessary --

6 THE COURT: And that would be in their
7 tender or their --

8 MR. YOUNG: Yes, they would have to say --

9 THE COURT: They agreed to do that?

10 MR. YOUNG: Right. Yes, your Honor. And
11 in their tenders they would say we -- we admit that
12 the MFTRP is the governing rule for this
13 transaction.

14 THE COURT: And then in the bill of lading
15 it stated that also? You sent back the bill of
16 lading, is that right, or no?

17 MR. YOUNG: Your Honor, I don't believe
18 the bill of lading spoke to that, but I'd have
19 to --

20 THE COURT: What was it that you sent to
21 the carrier to let them know they were hired and
22 here's the terms?

23 MR. YOUNG: Your Honor, honestly I'm not
24 entirely clear how the process worked at that point
25 other than there was obviously some notice that the

1 government provided to the defendants saying we'd
2 like to use you to ship freight.

3 THE COURT: Okay. But you don't know if
4 there was -- what the terms were?

5 MR. YOUNG: No. I mean -- and, your
6 Honor, we're talking about thousands and thousands
7 of tenders here. So I would hesitate to speak as
8 to any one. But one thing --

9 THE COURT: I'm assuming it was the same
10 language on any one --

11 MR. YOUNG: I think that's probably
12 correct, your Honor. And one additional point
13 though on this -- on this tender piece is that the
14 defendants -- as we alleged, the defendants also
15 made representations beyond just the standard, you
16 know, essential, you know, boxes that you had to
17 check in order to qualify. So as we allege in
18 paragraph 92 that the defendants -- in 2008 Yellow
19 sent an example of their tenders to -- to DOD and
20 that they promised that when -- Yellow promised to
21 reweigh the shipment it would correct the billed
22 weight accordingly.

23 THE COURT: In this tender Yellow promised
24 that when it reweighed a shipment it would quote,
25 correct the billed weight accordingly, close quote.

1 I thought that's what I was just asking. Maybe I
2 wasn't clear.

3 MR. YOUNG: If it was, your Honor, I
4 misunderstood. I'm sorry.

5 THE COURT: Were there terms in there that
6 told them what they were supposed to do and they
7 agreed to those terms or -- okay.

8 MR. YOUNG: Your Honor, I think -- I think
9 I may have been confused, because I was thinking
10 about terms that the government would have imposed,
11 and this was a representation that Yellow was
12 making on its own. So it wasn't required to
13 provide this language. This is an assurance it
14 provided to the government in addition to, you
15 know, its required assurance that it would follow
16 the -- you know, it would abide by the MFTRP and
17 follow those rules.

18 THE COURT: Okay. I just want you to talk
19 briefly about the issue about the speaker, for
20 instance, Exhibit A not having any of the
21 particular defendants noted.

22 MR. YOUNG: Yes, your Honor. Well --
23 well, two things on that. First, as we -- as we
24 allege in the complaint, Yellow and Roadway merged
25 in 2009 to become YRC. So when we allege claims

1 that are from 2010 to 2012 essentially after the
2 parties had merged we alleged them on, you know --

3 THE COURT: Your position --

4 MR. YOUNG: We thought it was evident that
5 it was YRC.

6 THE COURT: It doesn't matter, because
7 it's one or the other, and now they're together.

8 MR. YOUNG: Yes, your Honor. And also
9 that at this point they had merged, and it's all
10 one entity. We'd also say that to the extent that
11 we didn't differentiate between the various
12 defendants, that's -- that's not correct, your
13 Honor. We discuss in the complaint when Roadway
14 started its allegedly fraudulent reweigh practices.
15 We allege when Yellow started its allegedly
16 fraudulent reweigh practices. We differentiated
17 between the various companies when appropriate.

18 THE COURT: I think Mr. Cenawood's [sic]
19 point was Exhibit A you don't -- you don't say
20 which company. I mean, those are the list of
21 claims, right?

22 MR. YOUNG: That's correct, your Honor.

23 THE COURT: You don't say which company.

24 MR. YOUNG: We don't say which company
25 because we -- given that the companies had merged

1 at that point, we did not think we needed to
2 identify them. But we did, your Honor, identify in
3 Exhibits B, C, and D the tenders that each company
4 had accepted by the Department of Defense.

5 THE COURT: Okay. My last question for
6 you. You mentioned Escobar laid out you can prove
7 the materiality in one of two ways. Can you just
8 point me where that is in the decision?

9 MR. YOUNG: Yes, your Honor. It's -- it
10 is -- the pin cite is 136 S.Ct. and then it's 2002
11 to 2003. And the court essentially stated -- there
12 was some discussion about whether materiality was
13 governed by --

14 THE COURT: Hang on a second. Let me try
15 to find it here. Okay. I'm on 2002.

16 MR. YOUNG: I'm thinking of the
17 paragraph -- I mean, it's really the --

18 THE COURT: Tell me what the paragraph
19 starts with.

20 MR. YOUNG: I'm thinking just -- you can
21 start at the beginning of Section B, but it also --
22 your Honor, I would just start at the paragraph
23 that says we need not decide whether Section
24 3729(a)(1)(A)'s materiality requirement is governed
25 by Section 3729(b)(4) or derived directly from the

1 common law.

2 THE COURT: Okay. And then it says in
3 tort law, for instance, a, quote, matter is
4 material, close quote, in only two circumstances,
5 one, if a reasonable man would attach importance to
6 it in determining his choice of action in the
7 transaction, and that's what you're arguing --

8 MR. YOUNG: Yes, your Honor.

9 THE COURT: -- correct? Or two, if the
10 defendant knew or had reason to know that the
11 recipient of the representation attaches importance
12 to the specific matter in determining his choice of
13 action, even though a reasonable person would not.

14 Okay. Anything else, Mr. Young?

15 MR. YOUNG: Your Honor, I would just -- to
16 conclude, I would just say that this case is really
17 what the False Claims Act is designed to prevent.
18 The False Claims Act was enacted in order to
19 protect the public fisc and help the government
20 fight fraud, and the defendants in their pleadings
21 have really attempted to thwart that purpose by
22 misreading the applicable law and adding some
23 really hyper technical pleading requirements that
24 don't exist.

25 THE COURT: You know, I apologize. I told

1 you I asked my last question. I didn't. I just
2 remembered something I wanted to ask you. The
3 third cause of action, the -- what do they call it,
4 the reverse false claims?

5 MR. YOUNG: Yes. Yes, your Honor.

6 THE COURT: I guess I'm not getting that.
7 Your first do clause says they submitted a false
8 claim. They asked for too much money. The third
9 one says they didn't pay back an overpayment. I
10 guess I'm having trouble understanding, one, why
11 that's different. It seems you have to establish
12 the overpayment before you can possibly say they
13 had to return the money; and two, what does that
14 give you that you don't have I guess is my -- how
15 does that change the dynamics of this case I guess
16 I don't understand.

17 MR. YOUNG: Those are very fair questions,
18 your Honor. The reverse false claims allegations
19 only concern two specific contracts and really a
20 fraction of the claims at issue. There are two
21 contracts that Yellow and Roadway entered into in I
22 believe 2006 and they span to 2009. And those
23 contracts had a unique provision that's separate
24 from essentially all the other allegations in the
25 complaint saying that the defendants had an

1 obligation to essentially return overpayments to
2 the government. So in terms of what it -- what it
3 gets us and how it differentiates, the defendants'
4 false statements regarding weights essentially
5 prevented the government from enforcing that
6 overpayment provision in the contract, because it
7 prevented the government from knowing that not only
8 that overpayments existed, but how much they were,
9 to what extent they were. And then in terms of
10 what it gets us, it -- it's -- if for some reason
11 the defendants submitting false claims or claims
12 for weights that were inflated under those
13 contracts, if somehow those claims were not
14 actionably false, then this -- the reverse false
15 claim -- excuse me, the reverse false claim
16 allegations would give us an alternate means of
17 recovery.

18 THE COURT: I'm still not sure I get it.
19 It seems to me you've got to establish that they
20 made a false claim before -- under the scenario we
21 have present. It's not like a scenario where
22 somebody accidentally sent them too much money and
23 they kept it and didn't return it. That's not what
24 happened here, I don't think.

25 MR. YOUNG: Correct, your Honor. The

1 distinction the courts have found in cases where
2 there were essentially redundant allegations is --
3 the courts have found that when there is no
4 preexisting obligation, when there's no separate
5 obligation to return overpayments, then it's --
6 it's two sides of the same coin.

7 Here, there is -- there is that preexisting
8 independent contractual obligation to return
9 overpayments. So, there's -- you know, there is
10 some difference there.

11 THE COURT: Well, let's assume it was a --
12 under those two contracts there was a false claim,
13 just like we've gone through all of this. Then
14 that would be classified as an overpayment that
15 they had to return? Wouldn't you have to prove it
16 was false in the first instance?

17 MR. YOUNG: Well, your Honor, we -- we
18 wouldn't have to prove -- we'd have to prove --

19 THE COURT: Or do you not have to prove
20 it's a fraud?

21 MR. YOUNG: We would have to prove that
22 the -- we'd have to essentially prove the elements
23 with respect to retention of the overpayment as
24 opposed to submission of the false claim.

25 THE COURT: Well, I think maybe I'm -- so,

1 with regard to Count 3 with that section of
2 statute, is there no scienter or knowledge? It's
3 just oh, you got -- all you have to know is you got
4 overpaid. You don't have to have been fraudulent,
5 it doesn't have to be --

6 MR. YOUNG: There is, your Honor. The way
7 we look at this -- the way we look at this is the
8 defendants made false -- submitted false claims in
9 order to get paid. And then just for these two
10 contracts the defendants' false statements also
11 served a separate purpose, which was essentially to
12 prevent the government from enforcing this
13 contractual provision and saying you've received
14 overpayments and you need to pay us back. We're
15 not disputing that these are closely related
16 factually, these theories of recovery. But we do
17 think they are, you know, independent for legal
18 purposes, and we should be able to proceed
19 accordingly.

20 THE COURT: Okay. Mr. Cenawood [sic], you
21 want to --

22 MR. HILL: Just -- just a couple of
23 things, your Honor.

24 THE COURT: Do I have you guys wrong?

25 MR. CENAWOOD: Yeah, he's Mr. Hill.

1 THE COURT: Oh, Mr. Hill. I'm sorry.

2 MR. HILL: He probably could make the
3 argument better. Maybe I should -- just couple of
4 things, your Honor. We believe, contrary to what
5 was argued today by the government, the
6 government -- the government was aware of the
7 interpretation and the policy of how they handled
8 the negative reweighs as of the qui tam filing. We
9 offer that so that the Court can use that as an
10 anchor point to decide whether or not they have
11 taken and pled any action that would demonstrate
12 this approach to the contract was material. So we
13 disagree with that.

14 The other thing that we would point out -- I'm
15 not sure if this was where the Court was going or
16 not, but the Court was asking about the amendments,
17 and in particular we would argue that the 2013
18 amendment to the rule established that the
19 interpretation was reasonable that they were taking
20 and that it necessitated an amendment, that the
21 Court can take judicial notice of that.

22 THE COURT: You're arguing that the 2013
23 amendment, the necessity -- the necessity of such
24 an amendment pointed to the reasonableness perhaps
25 of your client's position?

1 MR. HILL: That's correct, your Honor.

2 THE COURT: Okay.

3 MR. HILL: That's all we have, your Honor,
4 on that.

5 THE COURT: Okay. I've read the papers
6 for the change of venue. Is there anything -- to
7 me, to be honest with you, it boils down to U.S.
8 Attorney's Office worked on the case here. Is it
9 reasonable to make them go to Kansas? I mean, that
10 seems to be the bottom line of it.

11 MR. HILL: Your Honor, the -- just to add
12 to that. This district has traveled on other false
13 claims matters pending outside of the district, the
14 Western District. So, they are capable and have
15 done that. They did so in the prefiling discovery
16 that they conducted. And we would suggest that
17 when you balance the two, the convenience of the
18 witnesses primarily residing in Kansas and the
19 documents primarily residing in Kansas sort of tilt
20 the scale.

21 One other thing just to note, your Honor, is
22 that the inference is that some of the witnesses
23 that would be called still work at the defendants,
24 have meaningful roles in the public company, and
25 that the idea of them being able to be in the

1 district where they are participating in the
2 litigation while still performing their duties and
3 responsibilities to the company, we think that that
4 is what the Western District courts had in mind
5 when they thought about convenience of parties.

6 THE COURT: Miss Lynch, are you handling
7 this?

8 MS. LYNCH: Yes, I am. Thank you. Judge,
9 I disagree with that characterization. First of
10 all, I don't also -- by the way, not with your
11 characterization. I disagree with his
12 characterization. But I will also say that I don't
13 think that's the only argument about this U.S.
14 Attorney's Office. I mean, even by Mr. Hill's own
15 statements and Kelly Kendall's statements in the
16 affidavit, it's clear that the majority of
17 witnesses are not in Kansas. I mean, there -- they
18 only said 11 of them are there. And they're
19 offering two separate districts as potential venue.

20 This is a nationwide case. That has happened
21 all across the nation. The relator is here. The
22 relator's counsel is here. The relator has
23 intimate knowledge of the workings of this entire
24 process. The conduct occurred all over the
25 country.

1 There's no question that the plaintiffs are --
2 I mean the defendants have not made a strong case,
3 which is required in this circuit for the transfer
4 of this case to another district. The only
5 issue -- the arguments they're trying to make is
6 that the parties and the witnesses, it would be
7 more convenient for them. It wouldn't. And we
8 have witnesses from all over the nation with SDDC,
9 not to mention that our Department of Defense --

10 THE COURT: So for a lot of witnesses it's
11 going to be inconvenient, no matter where it is.

12 MS. LYNCH: It's going to be inconvenient
13 for everybody, no matter -- we're all going to have
14 to travel. And to have another U.S. Attorney's
15 Office start engaging in this travel all over is
16 just -- it's a waste of the government resources.
17 It's a waste -- it's a negative impact on the
18 public fisc. It's absolutely not necessary.

19 THE COURT: Okay. I'll consider the
20 matter submitted. It's always nice to have an
21 argument with good attorneys on both sides.

22 MS. LYNCH: Thank you, Judge.

23 MR. HILL: Thank you, your Honor.

24 THE COURT: Sorry if it took longer than
25 what you thought. I'm not the sharpest knife in

1 the drawer. Sometimes I got to ask a lot of
2 questions.

3 MS. LYNCH: We appreciate that, Judge.

4 THE COURT: Okay. Have a great day. Have
5 a safe trip back.

6 MR. YOUNG: Thank you, your Honor.

7 MR. HILL: Thank you, your Honor.

8 THE COURT: Enjoy our Buffalo weather
9 while you're here.

10 MR. HILL: We did. We didn't make that as
11 an argument for the transfer.

12 MS. LYNCH: Wise move.

13 THE COURT: Have a great day.

14 MR. YOUNG: Thank you.

15 MR. HILL: Thank you, your Honor.

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CERTIFICATION

I certify that the foregoing is a
correct transcription, to the best of my
ability, from the electronic sound recording
of the proceedings in this matter.

s/Michelle L. McLaughlin
Michelle L. McLaughlin, RPR
Court Reporter